IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA
C.W.P. No: 65 of 2007

Judgment reserved on :19.6.2007

Date of decision: 27.6.2007

Balbir Bagga **Petitioner**

Versus

Financial Commissioner (Revenue) and others **Respondents.**

Coram

The Hon'ble Mr. Justice Deepak Gupta, ACJ

The Hon'ble Mr. Justice V.K.Ahuja, Judge

Whether approved for reporting?[1]

For the Petitioner: Mr. S.S.Mittal, Senior Advocate with
Mr. Baldev Singh, Advocate

For Respondents 1 to 4 :Mr.M.S.Chandel, Advocate General with
Mr. R.M.Bisht, Deputy Advocate General.

For Respondent No.5: Mr. Ajay Sharma, Advocate

Per Deepak Gupta, J.

By means of this writ petition the petitioner has raised challenge to the election of respondent No. 5 as Chairman, Zila Parishad, Una. The petitioner had filed an election petition in terms of Section 163 of the H.P.Panchayati Raj Act, 1994 (hereinafter referred to as the Act) challenging the election of respondent No. 5. This petition was allowed by the prescribed authority vide

---

[1] ***Whether the reporters of the local papers may be allowed to see the Judgment?***

order dated 7.8.2006. Respondent No. 5 filed an appeal against this order and this appeal has been allowed vide the impugned order dated 11.12.2006. Hence the present petition.

The brief facts relevant for the decision of the present case are that both, the petitioner and respondent No. 5 were elected as members of the Zila Parishad, Una. Election to the posts of Chairman and Vice Chairman of the Zila Parishad is held from amongst the members. The election is held by secret ballot. Rule 86 (13) (15) and (17) of the H.P.Panchayati Raj (Election) Rules, 1994 (hereinafter referred to as Election Rules) which are relevant reads as follows:-

> "13. The ballot papers shall be signed by the Presiding Officer and one paper each shall be handed over to each elected member for each election who shall put a cross (X) against the candidate for whom he wishes to vote. If a member is unable due to illiteracy, blindness or other physical infirmity to record his vote, the Presiding Officer of the meeting shall record the vote on ballot paper in accordance with the wishes of such member. <u>The ballot paper shall not be signed by the member nor be marked in any other way that could reveal his identity. If the paper is so signed or marked or mutilated, the vote shall be void.</u>
>
> 14. x x x x x x x x x x x x x x x x x x x x x

15. (i) Immediately after the voting is over, the Presiding Officer shall in the presence of the members present, open the box containing the ballot papers, count them and record the number thereof in a statement.

(ii) A ballot paper shall be invalid :-

(a) if it bears the signature of the member or contains word, or any visible representation by which he can be identified; or

(b) if marks are placed thereon against more than one candidate; or

(c) if the mark is so placed thereon as to make it doubtful for which one or two or more candidates the vote was intended to be given; or

(d) if no mark is placed thereon; or

(e) if it does not bear the signature of the Presiding Officer.

16. x x x x x x x x x x x x x x x x x x x x x

17. In case of equality of votes, the election shall be decided by lot to be drawn by the Presiding Officer."

(emphasis supplied)

Election to the post of Chairman of Zila Parishad, Una was held on 16.1.2006. The stand of the petitioner is that one vote which was marked as ~~X~~ instead of **X**, was initially declared invalid by the Returning Officer. Thereafter, according to the petitioner,

the Returning Officer received a telephonic call on his mobile phone. Then he went to the toilet and when he returned, he declared the vote to be valid.

We have gone through the original record and have seen the original vote. A perusal of the vote clearly shows that against the name of respondent No. 5 the vote has been marked as **X.** It is also clear that this vote was first declared to be 'invalid'. Thereafter the letters 'in' out of the words invalid have been scored off and the vote has been treated to be valid and next to it the word decided has been written above the signatures of the Returning Officer. The stand of the respondents is that in fact the vote was never declared to be invalid, but the Returning Officer kept his decision in abeyance after a dispute was raised before him as to whether the vote in question is valid or not. It is alleged that in fact first the election process to the post of Vice Chairman was completed and thereafter the matter of election to the post of Chairman was again taken up. After hearing both sides the Returning Officer declared the vote to be valid.

The main question which arises for consideration is whether the vote in question could be declared to be invalid in terms of Rule 86 (15) (ii) of the

Election Rules. It would be pertinent to mention that the provisions of Rule 86(15) (ii) are virtually identical to Section 100 of the Representation of the People Act, 1950. The Apex Court in **Hari Vishnu Kamath Vs. Ahmad Ishaque and others, AIR 1955 SC 233** while dealing with a similar question observed as follows:-

> "33. x x x x x x x x x x x. Under this rule quite clearly no candidate can be declared elected on the strength of votes which are liable to be rejected under Rule 47. The expression "the result of the election" in Section 100 (1) (c) (S. 100 (2) (c) ?) must, unless there is something n the context compelling a different interpretation, be construed in the same sense as in Section 66, and there it clearly means the result on the basis of the valid votes.
>
> 34. This conclusion is further fortified when the nature of the duties which a Returning Officer has to perform under Rule 47 is examined. Under that Rule, the Returning Officer has to automatically reject certain classes of votes for not being in conformity with the rules. They are set out under Rule 47 (1) (b) and (c). In other cases, the rejection will depend on his decision whether the conditions for their acceptance have been satisfied. Thus in Rule 47(1) (a) he must decide whether the mark or writing is one from which the elector could be identified."

The question to be decided is whether the vote which was marked in the fashion **X** is a valid vote or not. Rule 86(B) clearly lays down how an elector should cast his vote. A perusal of Rule 86 (15) (ii) clearly shows that a ballot paper shall be declared to be invalid if it contains any word or any visible representation by which an elector can be identified. By putting the horizontal line across the cross mark X an elector can easily be identified. A vote has to be cast in the manner in which it is prescribed. By putting this visible representation the elector could have been identified. It is not necessary that the election tribunal must identify the elector. The vote is to be declared to be invalid in case the elector can be identified. We are of the considered opinion that by putting such a horizontal line across the **X,** a message could have gone from the elector to the contesting person that he had cast a vote in his favour. Therefore, in our considered opinion this said vote which had not been cast in accordance with the provisions of Rule 86(13) and which contained a visible representation by which the elector could be identified had to be declared an invalid vote.

While taking the view that the aforesaid vote is invalid, we are also drawing support from the decision of the Apex Court in **Era Sezhiyan Vs. T.R. Balu and others AIR 1990 SC 838** wherein the Apex Court was considering a case wherein a voter was to mark his preference on the vote by using a ball point pen to be supplied by the polling assistant. The Supreme Court held as follows:-

> "15. x x x x x x x x x x x x . In the light of this evidence, we are of the view that the ball-point pen with blue ink kept in the voting compartment for marking the preference must be regarded as the article supplied for that purpose, namely, the purpose of the voter marking his preference on the ballot paper. It was submitted by learned counsel for the appellant that it was possible that a voter might have used his own pen if the pen kept in the voting compartment was not working and such a vote cannot be regarded as invalid. We are not concerned with a case of that kind here as there is no evidence that in any voting compartment the ball-point pen kept there was not working. It was next urged that if a voter had used another ball-point pen, that is, other than the one kept in the voting compartment containing the blue ink, it would not have been possible to find out that the preference marked with such a ball-point pen had been used for marking the preference and not the

> pen supplied. This is of no relevance here. The possibility that in a given case a breach of the rules may be difficult to detect cannot lead to the conclusion that the mandatory requirement that preference on the ballot paper must be marked with the article supplied for the purpose should be regarded as not binding in law. We are, therefore, of the view that the said ballot paper was rightly rejected by the returning officer and the arguments urged by learned counsel for the appellant in that contention must be rejected."

A perusal of the vote and the record of the case clearly shows that the Returning Officer had first declared the vote to be invalid. We are not going into the question as to whether the Returning Officer had the power to review his earlier decision or not. However, once he had declared a vote to be invalid and he later on, after hearing the parties, wanted to declare the said vote to be valid, he should have given reasons for the same. No such reasons are found in the minutes of the meeting. In fact in the minutes which are recorded, though it is mentioned that some dispute had arisen as to whether this vote is valid or not, no mention is made by the Returning Officer that this vote was initially declared invalid and was later declared valid.

Another interesting aspect is that in the election petition it is clearly stated that initially this vote was declared as invalid and thereafter when the Returning Officer was in the process of drawing the lots in terms of Rule 86(17), he received a telephone call on his mobile phone. The Returning Officer then went to the toilet and after he returned he changed his earlier decision and declared the vote to be valid. The Returning Officer was arrayed as a respondent in his personal capacity. In the reply(s) filed to the election petition these allegations are not specifically denied. In fact it is admitted that one vote was declared invalid, but respondent No. 5 opposed this decision and thereafter the same was declared to be valid by the Returning Officer. Therefore, it stands admitted that initially the Returning Officer had declared this vote to be valid. Why was this fact not reflected in the minutes of the meeting? The Returning Officer was bound to give reasons for declaring this vote to be valid, especially once he had declared it to be invalid.

In the present case the appellate authority has allowed the appeal of respondent No. 5 mainly on the ground that the intention of the voter in the present case

was absolutely clear. This may be true. It is also true that in a number of cases the Apex Court has held that where intention of the elector is clear then the votes should not be treated as invalid. However, in case the identity of the voter can be deciphered by some visible representation, the Returning Officer is bound to declare the vote invalid. Such an invalid vote which has been cast in a manner not permitted by law cannot be treated as a valid vote. The vote in question was cast in a manner which is totally violative of Rule 86 (13) and (15) and, therefore, this invalid vote cannot be used in favour of the respondents.

To be fair to Mr. Ajay Sharma, learned counsel for respondent No. 5, we must note that he has raised a preliminary objection that there are allegations of corrupt practices made in the petition and since the petition has not been supported by an affidavit in terms of Section 161 of the Act, the same should be rejected. In this behalf he has also relied upon a decision of this court in **Thakur Sen Negi Vs. Dev Raj Negi and another AIR 1994 SC 2526**. This argument, in our considered opinion, is totally misconceived. No allegations of corrupt practices as envisaged under Section 175 (1) (b) of the Act have

been levelled in the election petition. The allegations of corruption were against the Returning Officer and not against the candidate or his agent.

Mr. Ajay Sharma, Advocate, has also contended that the vote which is said to be invalid has not been property proved in accordance with law. In support of this contention he has relied upon **Sait Tarajee Khimchand and others Vs. Yelamarti Satyam and others AIR 1971 SC 1865.** This contention has also been raised only for the purpose of raising an objection. In the present case the vote was proved on record. It was accepted in evidence without any objection on behalf of the respondents. It is thus clear that at this stage the respondents cannot be heard to say that the vote was not properly proved.

In view of the aforesaid discussion we are of the considered opinion that the order of the Appellate Authority dated 11.12.2006 is illegal and is accordingly set aside and we uphold the order of the Divisional Commissioner, Kangra, dated 7.8.2006 whereby he has set aside the election of respondent No. 5. The petitioner shall also be entitled to costs of Rs. 5,000/- to be paid by respondent No. 5.

The writ petition is disposed of in the aforesaid terms. All the pending applications, if any, are also disposed of.

(Deepak Gupta), ACJ

June 27, 2007(K) (V.K.Ahuja), J.